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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Bell Operating Company)
Provision of Out-of-Region)
Interstate, Interexchange)
Services)

CC Docket No. 96-21

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AT&T Comments

Mark C. Rosenblum
Roy E. Hoffinger
Richard H. Rubin

Its Attorneys

Room 3252I3
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4481

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Summary

AT&T opposes the interim rules proposed in the NPRM, because they are premised on an unsupported departure from the Commission's long-standing analysis of the interexchange market, and because they are insufficient to prevent BOCs from leveraging their monopoly power in favor of their IXC affiliates. Nevertheless, AT&T would not oppose an interim waiver of dominant carrier regulations for BOC out-of-region affiliates, provided such a waiver imposes the separation requirements established in the NPRM, together with additional necessary safeguards. The additional safeguards should forbid BOC IXC affiliates to engage in joint marketing with, or to obtain customer information or other benefits arising from, their monopoly local affiliates' operations. AT&T also supports the proposal to require BOC out-of-region affiliates to be treated as non-regulated affiliates for accounting purposes.

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AT&T Comments

Pursuant to the Commission's Public Notice,¹ AT&T Corp. ("AT&T") submits the following comments on the Commission's Notice of Proposed Rulemaking ("NPRM") regarding the regulatory classification of Bell Operating Company ("BOC") affiliates which provide out-of-region interstate, interexchange services.

The Telecommunications Act of 1996 ("1996 Act")² permits BOCs, for the first time, to offer "out-of-region" interstate, interexchange services.³ The NPRM (§1) proposes

¹ 61 Fed. Reg. 6607, February 21, 1996.

² Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ Out-of-region calls include calls that originate in states where a BOC is not authorized to provide service as an incumbent local exchange carrier, including commercial mobile radio service calls. Out-of-region calls exclude 800 service and private line service, or their equivalents, that terminate in an in-region state of the BOC and that allow the called party to determine the interLATA carrier (see NPRM, n.2).

interim rules⁴ that would allow BOC affiliates that provide out-of-region services to be regulated as nondominant carriers if they comply with criteria similar to those for affiliates of independent LECs as set forth in the Competitive Carrier proceeding.⁵ Specifically, the NPRM proposes that, in order to be treated as nondominant, BOC out-of-region IXC affiliates must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with the BOC local exchange company; and (3) obtain any BOC exchange company services at tariffed rates and conditions.

⁴ See NPRM, ¶ 11 (proposed rules will operate "on an interim basis").

⁵ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) ("First Report and Order"); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) ("Fourth Report and Order"), vacated AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), cert. denied, MCI Telecommunications Corp. v. AT&T, 113 S.Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) ("Fifth Report and Order"); Sixth Report and Order, 99 FCC 2d 1020 (1985), vacated MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the Competitive Carrier proceeding).

AT&T opposes the proposed rules, because they are premised on an unsupported departure from the Commission's long-standing analysis of the interexchange market, and because they are insufficient to prevent BOCs from leveraging their monopoly power in favor of their IXC affiliates. Nevertheless, AT&T would not oppose an interim waiver of dominant carrier regulations for BOC out-of-region affiliates, provided such a waiver imposes the separation requirements in the NPRM, together with additional necessary safeguards.⁶ The additional safeguards would forbid BOC IXC affiliates to engage in joint marketing with, or to obtain

⁶ The scope of the NPRM appears to be limited only to domestic services. As noted in the AT&T Nondominance Order, review of carriers' market power in international markets requires a different (country-by-country) analysis that is not remotely within the scope of the NPRM. Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier, Order, FCC 95-427, released October 23, 1995, petitions for reconsideration pending ("AT&T Nondominance Order"), ¶ 2. See also NYNEX Long Distance Co. Application for Authority Pursuant to § 214 of the Communications Act of 1934, as Amended, to Provide International Services from Certain Parts of the United States to International Points Through Resale Of International Switched Services, I-T-C-95-125, dated February 23, 1996, p. 4 (stating NYNEX's view that it is "not clear" whether the instant proceeding covers out-of-region international services). To the extent nondominant treatment were extended to BOC out-of-region international services, the Commission should make clear that any BOC in-region termination services associated with U.S. inbound calls must be tariffed and available to all IXCs.

customer information or other benefits arising from, their monopoly local affiliates' operations.⁷

I. The NPRM Proposes Unsupported Changes in the Commission's Existing Rules.

More than fifteen years ago, the Commission defined nondominant carriers as those which lack market power in the relevant market.⁸ The Commission then also held -- and has reaffirmed in an unbroken line of decisions -- that the domestic interexchange market is a single nationwide market, with no relevant submarkets.⁹ The NPRM fails not only to provide a reasoned basis for departing from these precedents, but also to acknowledge the departure itself.

The necessary result of the regulatory scheme proposed in the NPRM is to abandon these established rules

⁷ AT&T has significant doubts about the sufficiency and enforcement of the Commission's existing rules as they apply to independent LECs and believes that it would be best to adopt a single, rigorous separation requirement that applies to all LECs' non-local exchange and exchange access activities. Nevertheless, in the interest of expediency and subject to the conditions stated herein, AT&T would not object to properly conditioned interim waivers applicable to BOC affiliates' provision of domestic out-of-region services.

⁸ First Report and Order, 85 FCC 2d at 23.

⁹ AT&T Nondominance Order, ¶ 22, citing Fourth Report and Order, 95 FCC 2d at 564.

and policies, without adequate basis or explanation.¹⁰ Foremost, the NPRM contemplates that BOC interexchange affiliates would be "nondominant" -- i.e., lacking in market power -- with respect to out-of-region service, but remain "dominant" for purposes of in-region long distance service. It is obvious a firm cannot both possess and lack market power in the same market, yet that is precisely the consequence of the NPRM's proposal. This is because the NPRM plainly does not propose to alter the established definition of a single nationwide market -- indeed, the NPRM barely even addresses the question of market power, and thus cannot validly propose to reclassify a carrier as nondominant.

Moreover, even if the NPRM had proposed to redefine the relevant market by creating distinct submarkets for BOC out-of-region and in-region interexchange service, there is no reason to conclude (and the NPRM proposes none) that a BOC lacks market power in the out-of-region market. To the contrary, the Commission has consistently recognized

¹⁰ See 5 U.S.C. §553(c) (after consideration of relevant matter presented in a notice and comment rulemaking proceeding, an agency "shall incorporate in the rules adopted a concise general statement of their basis and purpose"). See also Koch, Administrative Law and Practice (1985), § 3.73 ("[i]n order to avoid applying its own rules, an agency is generally required to give sound reasons for doing so").

that control of local exchange bottlenecks is "prima facie evidence of market power" in the nationwide interexchange market.¹¹ This conclusion remains valid because, as AT&T has previously explained,¹² a Bell company has significant incentive and ability to use its bottleneck position, among other things, to impede competition for long distance usage of business customers who have locations both within and outside the BOC's territory and who are offered superior local connections (or threatened with degraded ones) based on their choice of out-of-region interexchange carrier.

For these reasons, the change proposed in the NPRM cannot be adopted on this record. At a minimum, the NPRM would have to articulate a rationale both for redefining the relevant market into submarkets, and for abandoning the established linkage between local bottlenecks and market power. Such a proceeding would inevitably entail

¹¹ See NPRM, ¶ 9, citing First Report and Order, 85 FCC 2d at 21. See also NPRM, ¶ 5, quoting Fifth Report and Order, 98 FCC 2d at 1198-99 n.23 (acknowledging that the Commission's existing rules provide that BOCs entering the interexchange market must be classified as dominant carriers).

¹² See United States v. Western Electric, Civ. Action No. 82-0192 (D.D.C.), AT&T's Comments on Southwestern Bell's Motion for Waiver to Exempt Out-of-Region Telecommunications Services from Section II of the Decree, pp. 9-12 (filed with the Department of Justice, Sept. 6, 1994); id., AT&T's Comments on the Report and Recommendations of the United States, pp. 66-72 (March 13, 1987)).

significant complexity and controversy which, in AT&T's view, is unnecessary and counterproductive. A far more efficient use of the Commission's resources would be to consider granting waivers of the dominant carrier rules as necessary to permit appropriate flexibility for BOC out-of-region offerings. In view of the explicitly interim character of the change proposed in the NPRM, AT&T would not oppose such waivers, provided they are subject to the requirements set forth in the NPRM and to the necessary additional safeguards described below.

II. Additional Safeguards are Necessary to Protect Against Misuse of the BOCs' Local Monopoly Power.

The separation requirements described in the NPRM are necessary to guard against misuse of BOC bottlenecks. Those requirements are not sufficient, however, because they fail to account for the valuable information BOCs derive from their monopoly operations that can -- and likely will -- be used unfairly to advantage their out-of-region IXC affiliates. Thus, any waiver for the BOCs' out-of-region affiliates must include additional safeguards to prohibit joint marketing and any sharing of information between the IXC affiliates and the BOCs' monopoly in-region local operations.

These additional safeguards are necessary because many business customers have locations in multiple states

and many consumers have more than one residence. Thus, for example, a Bell Atlantic IXC affiliate operating in Illinois could use the monopoly power and information of its sister local company to sell interexchange services to the Chicago branch office of a Philadelphia-based company. Similarly, a NYNEX IXC affiliate operating in Florida could use the customer information of its New York LEC to sell services to "snow birds" who maintain residences in both New York City and Fort Lauderdale. Even more perversely, BOCs' local monopoly operations could offer access discounts (or threaten inferior access arrangements) to in-region customers because of their decisions to buy (or not buy) interexchange services from BOC out-of-region affiliates. All of these uses of the BOCs' local power to favor their out-of-region affiliates should be expressly prohibited as a condition of any waiver granted herein.

III. BOC Out-of-Region Affiliates Should be Treated as Non-Regulated Affiliates for Accounting Purposes.

The NPRM (§ 5) seeks comments on whether a BOC affiliate providing out-of-region services should be treated as a non-regulated affiliate for BOC accounting purposes. Such a requirement is necessary if the waiver conditions are to have any beneficial effect at all. Otherwise, there would be no constraints on the BOCs' ability to cross-subsidize their IXC affiliates with impunity, and no way to

determine whether their monopoly local exchange assets and advantages are being used unfairly to benefit their affiliated IXCs to the detriment of all other IXC competitors. It is also necessary to require that independent auditors periodically certify that non-structurally separated BOC out-of-region affiliates retain their financial independence.

Conclusion

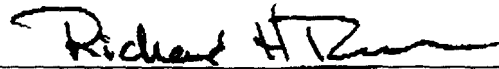
The Commission should not adopt the rules proposed in the NPRM, but it may, subject to the conditions described above, grant waivers of the dominant carrier regulations for BOC out-of-region affiliates. In all events, the Commission should prohibit joint marketing between BOC local and IXC operations, as well as any sharing of customer information or other use of bottleneck power of BOC local monopolies. The Commission should also require BOCs to treat out-of-

region affiliates as non-regulated affiliates for accounting purposes and require the BOCs to submit to periodic independent audits.

Respectfully submitted,

AT&T CORP.

By



Mark C. Rosenblum
Roy E. Hoffinger
Richard H. Rubin

Its Attorneys

Room 3252I3
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Basking Ridge, NJ 07920
(908) 221-4481

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